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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSHUA HERNANDEZ,

Defendant and Appellant.

2d Crim. No. B319954
(Super. Ct. No. 22PT-00137)
(San Luis Obispo County)

Joshua Hernandez appeals from the judgment entered after the trial court determined he met the criteria for commitment as an offender with a mental health disorder (OMHD) pursuant to Penal Code section 2962.¹ Appellant contends the commitment order should be reversed because insufficient evidence supports the trial court's finding that he represents a substantial danger of physical harm to others. We affirm.

¹ All further statutory references are to the Penal Code.

*Procedural History*²

In 2004, appellant walked into a random stranger's home and attacked several individuals inside with a knife. After the attacks, appellant fled the scene. The next morning, appellant walked into an assisted living facility, naked, and randomly attacked a caregiver working there.

Appellant was convicted by jury trial of three counts of attempted murder (§§ 664, 187, subd. (a)), five counts of assault with a deadly weapon (§ 245, subd. (a)(1)), first degree burglary (§§ 459, 460, subd. (a)), infliction of unjustifiable physical pain or mental suffering on a child (§ 273a, subd. (a)), and second degree burglary (§§ 459, 460, subd. (b)). The jury found true the great bodily injury enhancement allegations charged in connection with the three attempted murder counts and four of the assault with a deadly weapon counts, and found the defendant was sane at the time the offenses were committed. He was sentenced to 22 years in state prison.

Appellant was due to be released on parole in late December 2021. However, in November 2021, the Board of Prison Terms (Board) determined appellant met the criteria for commitment as an OMHD pursuant to section 2962. Appellant filed a petition challenging the Board's decision (§ 2966, subd. (b)), was appointed counsel, and waived jury trial.

The OMHD hearing

In April 2022, the trial court conducted a hearing on the petition. The People presented testimony from Dr. Kavita Chowdhary, a forensic psychologist at Atascadero State Hospital

² This procedural history is drawn from the appellate court's decision in appellant's direct appeal from his conviction. (*People v. Hernandez* (June 7, 2007, A111239) [nonpub. opn.])

(ASH). Dr. Chowdhary testified that appellant suffered from schizophrenia, a severe mental disorder, manifested by paranoid grandiose and delusional beliefs, significantly disorganized thought process, auditory and visual hallucinations, including hearing voices and seeing spirits. Appellant also had several religious delusions about being Jesus or a lesser god. When symptomatic, appellant can be very irritable, aggressive, and agitated.

Dr. Chowdhary described appellant's history of psychiatric treatment, including numerous inpatient hospitalizations stemming back to 2002. In 2004, appellant was hospitalized at ASH after having been found incompetent to stand trial. He subsequently had five inpatient hospitalizations while in prison and was treated at the enhanced outpatient program level of care for most of his prison term. Appellant received psychotropic medications for his mental illness, was on an involuntary medication order from 2007 to 2021, and was currently receiving psychiatric treatment at ASH.

Dr. Chowdhary opined that appellant's severe mental disorder caused or aggravated appellant's commitment offense. The probation report indicated that during an interview, appellant reported several delusional beliefs about hearing voices, seeing visions, and being a lame God. The voices told him to stab, kill or choke the victims, and appellant did not believe killing mortals would be terrible.

Dr. Chowdhary testified that appellant's severe mental health disorder was not in remission at the time of the Board's hearing as he continued to experience psychotic symptoms. When appellant was admitted to ASH in December 2021, he presented as "highly symptomatic" and "actively psychotic." He

was experiencing delusions, had a significantly disorganized thought process, made bizarre statements, was hearing voices, was extremely paranoid, and was seen responding to internal stimuli by staff.

Dr. Chowdhary opined that appellant represented a substantial danger of physical harm to others because of his severe mental disorder. She based this opinion on several risk factors, including appellant's history of violence related to his mental illness, his offenses were "extremely violent and aggravated by his mental illness," he was "very psychotic" at the time, his behavior was "very irrational and impulsive towards strangers," and there was "no rationale behind his actions." Dr. Chowdhary also considered an incident in 2002 where appellant believed he was Jesus and fired a shot at an intruder. There were also several instances in prison where appellant believed an inmate was the devil. Appellant was deemed dangerous, placed on an involuntary medication order, and placed in a single cell because of his dangerousness.

Dr. Chowdhary considered other risk factors as well, including that appellant's symptoms were not in remission, he had poor insight into his mental illness and the need for treatment as reflected by a lack of adequate treatment compliance. He refused treatment in the past. He also had a history of substance abuse in the community, had not participated in a substance abuse treatment program, and the use of illegal substances would have a detrimental effect on his symptoms. Appellant also lacked a discharge plan. Consequently, Dr. Chowdhary did not believe appellant would have the ability to control his symptoms if released into the community.

According to Dr. Chowdhary, appellant met all the criteria for treatment as an OMHD.

On cross-examination, Dr. Chowdhary acknowledged that appellant's stability had improved at ASH. Dr. Chowdhary also acknowledged that appellant had been completely blind since 2005 and required assistance to get around the hospital. She acknowledged that appellant had not struck anyone since his commitment offense in 2004 or threatened anyone since 2015. However, Dr. Chowdhary opined that appellant was still dangerous notwithstanding his blindness. As she explained, appellant's psychosis was "so severe when he was unmedicated" and his offenses were "very violent in nature and there were multiple victims involved, his visual impairment reduces the risk somewhat but not enough."

In addition to Dr. Chowdhary's expert testimony, the People introduced into evidence appellant's medical records from ASH, which included hospital evaluations and progress notes from December 2021 to February 2022. Those records indicated that appellant was "psychiatrically stable," compliant with his medication, and his behavior was "grossly appropriate," "polite," and "cooperative." There were no recent documented incidents of aggression by appellant, his risk level of violence was "moderate" or "low," and appellant was at a "high risk of victimization" because he was completely blind, walked with a cane, was actively paranoid of others, and therefore likely to be at high risk of retaliation.

After hearing testimony and considering the evidence, the trial court found the criteria pursuant to section 2962 to be true, denied appellant's petition, and ordered appellant committed to

the Department of Mental Health for treatment as required by law.

Mootness

This appeal is technically moot because the initial confinement ordered for appellant expired one year from the date he should have been released on parole. However, because appellant is subject to repetition of this process, and the issue presented is of recurring importance and is likely to evade appellate review due to the time constraints of the OMHD commitment, we address the merits. (See *People v. Gibson* (1988) 204 Cal.App.3d 1425, 1429 (*Gibson*).)

Sufficiency of the Evidence

Appellant contends the evidence is insufficient to support the finding that he represented a substantial danger of physical harm to others by reason of his severe mental disorder. We disagree.

Under the OMHD Act (§ 2960 et seq.), a prisoner adjudicated an OMHD may be civilly committed during and after parole if certain criteria are met. (§§ 2962, 2966.) Those criteria include the following: (1) the prisoner has a severe mental health disorder that is not in remission or cannot be kept in remission without treatment; (2) the severe mental health disorder was one of the causes of, or was an aggravating factor in, the commission of a crime for which the defendant was sentenced to prison; (3) the prisoner has been in treatment for the severe mental disorder for 90 days or more within the year prior to his parole or release;³ (4) by reason of the prisoner's severe mental health disorder, he

³ The parties stipulated that appellant received 90 days of mental health treatment during the year preceding his scheduled parole, as required by statute.

represents a substantial danger of physical harm to others; and (5) the crime for which the prisoner was sentenced falls into one of a number of specified categories. (§ 2962, subds. (a)-(d)(1), (e); *People v. Clark* (2000) 82 Cal.App.4th 1072, 1075-1076 (*Clark*).)

Our role on appeal is a limited one. “In considering the sufficiency of the evidence to support [OMHD] findings, an appellate court must determine whether, on the whole record, a rational trier of fact could have found that defendant is an [OMHD] beyond a reasonable doubt, considering all the evidence in the light which is most favorable to the People and drawing all inferences the trier [of fact] could reasonably have made to support the finding.” (*Clark, supra*, 82 Cal.App.4th 1082-1083.) It is not our function to reweigh the evidence or redetermine witness credibility. (*People v. Poe* (1999) 74 Cal.App.4th 826, 830 (*Poe*).) A single psychiatric opinion that an individual is dangerous due to a severe mental disorder constitutes substantial evidence to support the OMHD commitment. (*People v. Bowers* (2006) 145 Cal.App.4th 870, 879 (*Bowers*); *People v. Zapisek* (2007) 147 Cal.App.4th 1151, 1165 (*Zapisek*).)

In challenging the sufficiency of the evidence, appellant cites *Gibson, supra*, 204 Cal.App.3d 1425 for the proposition that “the element of dangerousness constitute[s] a separate and independent requirement that . . . could not be based exclusively on either the existence of the prisoner’s mental illness or the role of the illness in the underlying offense.” But our decision in *Gibson* addressed a former version of the OMHD statute that has since been amended by our Legislature to require proof that a defendant represents a substantial danger of physical harm to others prior to commitment or recommitment to an inpatient facility or outpatient facility. (*People v. Robinson* (1998) 63

Cal.App.4th 348, 350.) Even so, *Gibson* does not aid appellant because the trial court's finding that appellant currently represents a substantial risk of harm was based on more than just the existence of appellant's mental disorder or its role in the commitment offense.

Here, the trial considered the "totality of the evidence" and credited the testimony of Dr. Chowdhary that appellant represented a substantial danger of physical harm to others due to his severe mental disorder because, among other things, appellant's disorder was not in remission, he had a history of violence, lacked insight into his mental illness, and his compliance with treatment was inadequate. He also had a history of substance abuse in the community, had not participated in a substance abuse treatment program, and lacked a discharge plan. This is sufficient to support the trial court's finding. (*Bowers, supra*, 145 Cal.App.4th at p. 879; *Zapisek, supra*, 147 Cal.App.4th at p. 1165.)

Appellant contends Dr. Chowdhary's opinion is "belied" by his blindness, as well as his medical records, which reflect his current condition and behavior. He contends none of the factors relied on by Dr. Chowdhary properly support a finding of dangerousness because they are based on his past history and commitment offense rather than his present condition.

Appellant's contentions are in essence a request that we reweigh the evidence credited by the trier of fact. We decline to do so. (See *Poe, supra*, 74 Cal.App.4th at p. 830.)

Nevertheless, appellant's contentions are meritless.

First, based on this record, ample evidence supports Dr. Chowdhary's expert opinion that appellant met the criteria of section 2962, "as of the date of the Board[s] . . . hearing." (§

2966, subd. (b).) The hearing was conducted by the Board in November 2021. Thus, to the extent appellant's medical records reflect his "behavior or mental status subsequent" to that date, those records are irrelevant. (*Ibid.*) Moreover, the record reflects that Dr. Chowdhary did consider appellant's blindness in formulating her opinion as to his present risk of dangerousness. Dr. Chowdhary explained that appellant's blindness reduces his risk of dangerousness but not enough given the severity of his psychosis when he was unmedicated and the violent nature of his offenses with multiple victims.

Second, Dr. Chowdhary properly considered appellant's past acts in determining whether, at the time of the Board's hearing, appellant's condition rendered him dangerous to others. Substantial danger of physical harm "appears to mean a prediction of future dangerousness by mental health professionals." (*In re Qawi* (2004) 32 Cal.4th 1, 24 (*Qawi*).) A mental health professional "may and should take into account the prisoner's entire history in making an [OMHD] evaluation. This includes prior violent offenses as well as the prisoner's mental health history." (*People v. Pace* (1994) 27 Cal.App.4th 795, 799.) Indeed, "[a] prior violent offense has a tendency in reason to show that the prisoner poses a 'substantial danger of physical harm to others.'" (*Ibid.*)

Third, the fact that appellant has not engaged in any recent violence "does not prove he no longer suffers from a mental disorder that poses a danger to others." (*People v. Sumahit* (2005) 128 Cal.App.4th 347, 353.) "[A] finding of recent dangerousness is not required." (*Qawi, supra*, 32 Cal.4th at p. 24; § 2962, subd. (g) ["substantial danger of physical harm' does not require proof of a recent overt act"].)

Disposition

The judgment (OMHD commitment order) is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

BALTODANO, J.

Kathryn T. Montejano, Judge
Superior Court County of San Luis Obispo

Gerald J. Miller, under appointment by the Court of
Appeal, for Defendant and Appellant.

Rob Bonta, Attorney General, Lance E. Winters, Chief
Assistant Attorney General, Susan Sullivan Pithey, Senior
Assistant Attorney General, Steven D. Matthews, Supervising
Deputy Attorney General, and J. Michael Lehmann, Deputy
Attorney General, for Plaintiff and Respondent.